DEC 17 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1973

NO. 73-933

K. G. PARSONS, IVA E. PARSONS, *et al.*,
Petitioners,

v.

OTHO KNOPP AND NAOMI M. KNOPP,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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OTHO W. KNOPP AND NAOMI M. KNOPP,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on September 17, 1973.

OPINION BELOW

No opinion was rendered by the Supreme Court of Appeals of West Virginia nor is the case officially reported. The order denying the petition for appeal is set forth in full in Appendix A.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on September 17, 1973, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether petitioners were denied their Seventh Amendment right to trial by jury in all civil cases.

2. Whether West Virginia appellate procedure denied petitioners due process and equal protection of the laws, as guaranteed by the Ninth and Fourteenth Amendments, in that petitioners were effectively denied an appeal as a matter of right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Seventh Amendment

> "In suits at common law . . . the right of trial by jury shall be preserved . . . "

Ninth Amendment

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF WEST VIRGINIA

Article Eight, Section Six

"A writ of error, supersedeas, or appeal shall be allowed only by the Supreme Court of Appeals, or a judge thereof, upon a petition assigning error in the judgment or proceedings of the inferior court and then only after said court or judge shall have examined or considered the record and assignment of errors, and is satisfied that there is error in the same, or that it presents a point proper for the consideration of the Supreme Court of Appeals."

WEST VIRGINIA STATUTES

Chapter 58, Article 5, Section 1, West Virginia Code, 1931, as amended.

A party to a controversy in any circuit court may obtain from the Supreme Court of Appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supercedeas to, a judgment, decree or order of such circuit court in the following cases: (a) In all civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment decree or order . . .

Chapter 58, Article 5, Section 3, West Virginia Code, 1931, as amended.

Any person . . . wishing to obtain a writ of error, appeal, or supercedeas . . . may present a petition therefor to the Supreme Court of Appeals . . . which petition shall assign errors.

STATEMENT OF THE CASE

For convenience, the parties will be referred to as "petitioners" and "respondents" herein.

On March 17, 1970, the respondents instituted an action against the petitioners seeking, *inter alia*, to oust the petitioners from lands allegedly owned by the respondents. The action before the trial court in Jackson County, West Virginia, although unclear, purportedly involved the reformation of a deed on the basis of a mutual mistake of fact. The question of fact was whether petitioner Parsons had actual knowledge of the mistake in the deed prior to purchase. Petitioners made a specific and timely demand for a trial by jury as to all issues of fact so triable. Based upon evidence contained in depositions a first motion for summary judgment was granted the respondents on October 20, 1970. However, petitioners moved to set aside the summary judgment previously entered and the trial court set aside its own judgment by order dated June 3, 1971.

On March 23, 1972, by deposition, the petitioner K. G. Parsons denied any knowledge of the alleged mistake in the deed. The trial court then denied a second motion for summary judgment made by respondents earlier on December 27, 1971. In its order denying the motion for summary judgment, dated April 17, 1972, the trial court refused petitioner's motion and demand for a jury trial. The court further held that upon completion and submission of all depositions the case would be submitted to the court for decision. On April 18, 1972, the trial court issued its findings of fact and conclusions of law, holding there was a mutual mistake and, more importantly, that the petitioner, K. G. Par-

sons, did have knowledge of the mistake prior to the conveyance. The final judgment order was entered on May 1, 1972, and petitioner's motion to set aside the judgment was denied on May 10, 1972.

On February 5, 1973, petitioners applied for a writ of error to the Supreme Court of Appeals of West Virginia. The petitioner alleged, *inter alia*, that he was denied his constitutional right to a trial by jury. On September 17, 1973, the judgment of the Supreme Court of Appeals of West Virginia was entered denying the writ without comment or opinion.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Denied Petitioners the Right to Trial By Jury as Guaranteed by the Seventh Amendment to the United States Constitution.

Although a valid material issue of fact was presented in the trial court and a timely demand for a jury trial was requested by petitioners, the case was decided by the court sitting without a jury. The jury trial issue was sufficiently raised and made a point of error in the petition for writ of error which was denied by the Supreme Court of Appeals of West Virginia. The right to trial by jury is a constitutional right guaranteed by the Seventh Amendment to the United States Constitution.

It is apparent from the pleadings and orders in this case that the respondents sought and received both equitable and other relief in the trial court and that the petitioners were effectively denied a trial by jury upon any of the issues created by the pleadings. Admittedly,

the jurisdiction of equity to reform written instruments on the basis of mutual on the basis of mutual mistake is well established, *Lusher* v. *Sparks*, 146 W. Va. 795, 122 S. E. 2d 609, 615 (1961), but it is equally as clear that it is error for the court, in lieu of a jury, to try issues involved in an action at law where there had been an appearance by the defendant, issue joined and the case matured for trial, unless it appears from the record that trial by jury was waived. *Salzer* v. *Schwartz*, 88 W. Va. 569, 107 S.E. 298 (1921).

The petitioners' right to a jury trial was compelled by the nature of the relief sought by the respondents, i.e., to oust petitioners from the land and to clear up the alleged cloud on respondent's title (R. 13). This relief, of necessity, had to be predicated upon West Virginia Code, 1931, as amended, 55-3 and/or Code 55-4, the Unlawful Entry or Detainer and Ejectment provisions. Code 55-3, establishes a statutory procedure for action against one who has unlawfully entered upon the lands of another and in which the right to possession may be established. *Feder* v. *Hager*, 64 W. Va. 452, 63 S. E. 285 (1908). Section 3 thereof provides, in part, that upon defendants' plea and issue joined ". . . a jury shall be impaneled to try whether he unlawfully withholds the premises in controversy . . ." and in 8 M. J., *Forcible Entry and Detainer* §24, page 550, it is noted that:

> "Questions of fact are for the jury, under proper instructions . . . Similarly, the question of whether a party had notice of certain facts in a question of fact for the jury."

Similarly, Code, 55-4-3, enables a person to bring an action of ejectment if, at the time of commencement

thereof, he has a subsisting interest in the premises claimed and a right to recover or to possess the premises. Section 10 provides that upon the defendant's plea the defendant may give in evidence any matter which would have barred the action of the plaintiff under the abolished writ of right and his plea puts in issue the right and title of the plaintiffs to all the lands sued for. *Wilson* v. *Caldwell*, 98 W. Va. 661, 127 S. E. 497 (1925). Section 17 provides for the type of jury verdict which may be rendered as to the property involved, which verdict the court may not amend. *Yonker* v. *Grimm*, 101 W. Va. 711, 133 S. E. 695 (1926). Section 19 requires that the judgment for the plaintiff shall be that he recover the possession of the premises, according to the verdict of the jury and under section 26 the judgment is conclusive as to the right of possession established therein, including the verdict and judgment fixing a boundary line. *Wade* v. *McDougle*, 59 W. Va. 113, 52 S. E. 1026 (1906).

Significantly, section 31, provides that any person having a subsisting interest in real estate and a right to possession thereof, may file a petition to have ascertained and designated by the court "... the true boundary line or lines to such real estate, as to one or more of the coterminous landowners . . ." The petitioner therein shall make defendants all persons having a present interest in the boundary line sought to be ascertained and the defendants may file an answer and "... the parties shall be deemed to be at issue, which issue shall be the true boundary line or lines of such real estate. The trial shall be conducted as other trials at law, and the same rules of evidence shall apply and the same defenses may be made as in other actions at law. *A trial by jury may be waived by consent of the*

parties, and the case be tried by the court . . . The judge . . . may direct such surveys to be made as he may deem necessary . . ." and ". . . the judgment may be enforced in the same manner as a judgment in an action of ejectment . . ." (Emphasis supplied). Under an identical provision, the Court, in *Collier* v. *Hiden*, 120 Va. 453, 91 S. E. 630 (1917), held that the proceeding had been erroneously had on the chancery side and the court thus erred in disposing of the case without a jury.

In the instant case there is no question that the trial court, in its findings and orders, ousted the petitioners from the property and required them to remove a fence prior to a final adjudication, appointed a surveyor and established the boundary line predicated thereon, reformed petitioners' deed and set aside petitioners' deed in disregard of the petitioners' right and demand to a jury trial of the questions involved. See, *Banks* v. *Underwood*, ——W. Va ——, 190 S. E. 2d 438, 442 (1972), where the Court stated that if the plaintiffs proceed upon a theory in the nature of ejectment they should be required to abide with the substantive law dealing therewith; that while ". . . our Rules of Civil Procedure now apply to the matter of pleadings formerly used in ejectment the substantive law of ejectment is still applicable." Cf. Lugar & Silverstein, W. Va. Rules, page 26, for statutory proceedings in which the rules apply.

Moreover, it is and was of no signifiance that a portion of the relief sought and granted was equitable in nature in view of *Ross* v. *Bernhard*, 396 U. S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). In that case corporate stockholders brought a derivative suit contending, *inter alia*, that the defendant directors had con-

verted assets of the corporation and that the defendant brokers had extracted excessive fees from the corporation and demanded a jury trial. On motion to strike the stockholders' jury trial demand, the district court held that a shareholder's right to a jury on his corporation's cause of action was to be judged as if the corporation were itself the plaintiff but the Court of Appeals reversed, holding that a derivative action was entirely equitable in nature, and that no jury was available to try any part of it. (403 F. 2d 909). The Supreme Court, in reversing, at page 733, (24 L. Ed. 2d), of the opinion noted that:

> "However difficult it may have been to define with precision the line between actions at law dealing with legal rights and suits in equity dealing with equitable matters . . . some proceedings were unmistakably actions at law triable to a jury. The Seventh Amendment, for example, entitled the parties to a jury trial in actions for damages to a person or property, for libel and slander, *for recovery of land*, and for conversion of personal property . . ." (Emphasis supplied).

At page 736 (24 L. Ed. 2d), after referring to several decisions under the federal rules, the Court continued:

> ". . . Under those cases, where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends upon the nature of the issue to be tried rather than the character of the overall action . . ."

Applied to the instant case it is apparent that respondents had an adequate remedy of law and did, in fact, pursue that remedy *via* Code, 55-3, and 55-4, thus making pure equitable relief unavailable. In this respect the Court, in the *Ross* case, at page 736 (24 L. Ed. 2d) noted:

> "If under older procedures, now discarded, a court of equity could properly try the legal claims of the corporation presented in a derivative suit, it was because irreparable injury was threatened and no remedy at law existed as long as the stockholder was without standing to sue and the corporation itself refused to pursue its own remedies. Indeed, from 1789 until 1938, the judicial code expressly forbade courts of equity from entertaining any suit for which there was an adequate remedy at law. This provision served 'to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed' . . . If, before 1938, the law had borrowed from equity, as it borrowed other things, the idea that stockholders could litigate for their recalcitrant corporation, the corporation claim, if legal, would undoubtedly have been tried by a jury."
>
> "Of course, this did not occur, but the Federal Rules had a similar impact. Actions are no longer brought as actions at law or suits in equity. Under the Rules there is only one action — a 'civil action'—in which all claims may be joined and all remedies are available. Purely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity were destroyed . . . Under the rules, law and equity are combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court. The 'expansion of ad-

> equate legal remedies provided by . . . the Federal Rules necessarily affects the scope of equity' . . ." *Given the availability in a derivative action of both legal and equitable remedies, we think the Seventh Amendment preserves to the parties in a stock holder's suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its claims . . .*" (Emphasis supplied)

Cf. West Virginia Constitution, Article 3, Section 10; Rules 1, 2, 8(b)) and (c), 12(b), 38 and 39, West Virginia Rules of Civil Procedure which, *inter alia*, guarantee the right of trial by jury of issues as presented herein.

2.

The Decision Below Summarily Denied Petitioners an Appeal as a Matter of Right and Thus Denied Protection of the Ninth and Fourteenth Amendments to the United States Constitution.

No appeal as a matter of right exists in the State of West Virginia. Every state with the exception of West Virginia and Virginia provides for an appeal to either an intermediate appellant court or to the highest appellate court in the state as a right.

In West Virginia, statutory procedures require an application for appeal by means of an *ex parte* petition for a writ of error. The Supreme Court of Appeals, in its discretion, then determines whether there should be a full review of the case with presentation and arguments by both parties in the event the appeal is granted. A denial of the petition for writ of error is executed by entry of a brief order reciting such denial. Thus, no opinion, memorandum or other comment is

available to an unsuccessful appellant-petitioner for possible future clarification in a petition for rehearing. A review of appellate procedures in other states reveals that those citizens, via state constitutions or statutory provisions, are entitled to a full appellate review upon briefs and arguments of counsel for both parties, as a matter of right.[1]

Chapter 58, Article 5, *et seq.*, West Virginia Code, 1931, as amended, are the applicable statutory sections dealing with appellate relief in the Supreme Court of Appeals of West Virginia. West Virginia Code 58-5-1, 1931, as amended, in pertinent part, provides:

> "A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases: (a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree or order;"
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> * * * *

There are no intermediate appellate courts in West Virginia and an application for appeal from a circuit

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[1]West Virginia and Virginia are the only two states which presently require *applications* for appellate review as opposed to an appeal as a matter of right. The State Codes and Constitutions of these two states are very similar due to the fact that West Virginia, upon entry to the Union in 1863, was formerly a part of the State of Virginia and adopted various constitutional provisions, statutes and procedures from the existing body of Virginia law. See also, Judicature, "Is the Right of Appeal Protected By the Fourteenth Amendment?," Vol. 54, No. 7, February, 1971.

court judgment must be taken according to the procedures set forth in West Virginia Code, 58-5 *et seq.*[2]

In addition, West Virginia Code, 58-5-3, provides:

> "Any person who is a party to such controversy, wishing to obtain a writ of error, appeal or supersedeas in the cases named in the first section [§58-5-1] of this article, may present a petition therefor to the supreme court of appeals, or to a judge thereof in vacation, which petition shall assign errors.

West Virginia Code, 58-5-4, specifies that an application for appeal must be filed within eight months after the entry of the judgment order in the circuit court. This time limit is mandatory and jurisdictional and a failure to comply is fatal. *State* v. *Legg*, 151 W. Va. 401, 406 151 S. E. 2d 215 (1966).[3]

It is notable that in the instant case the petition for writ of error and supersedeas was filed on February 5, 1973 and no decision to grant or deny the writ was entered until September 17, 1973. Keeping in mind the eight month appeal time, this left only until October 5, 1973 for petitioners to prepare a petition for reapplication to the Supreme Court of Appeals. Since the pe-

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[2]Civil and Criminal appellate procedure is basically the same in West Virginia. An appeal of a conviction must also begin with an application for appeal by petition for a writ of error and supersedeas.

[3]This has been the general rule in West Virginia since 1885 when the West Virginia Supreme Court so held in the case of *Lloyd* v. *Kyle*, 26 W. Va. 534 (1885). See also, *Sothen* v. *Continental Assurance Co.*, 147 W. Va. 458, 128 S. E. 2d 458 (1962); *State ex rel Davis* v. *Boles*, 151 W. Va. 221, 151 S. E. 2d 110 (1966).

tition filed on February 5, 1973, was denied unanimously without an opinion, there was little likelihood of a successful application a second time due to petitioners being unaware of any shortcomings or possible areas of judicial question in the original petition.

To a degree, West Virginia appellate relief can be compared with relief in this Court in that no appeal lies as a right. A case presented in this Court, either on appeal or certiorari, can be denied without opinion or further argument.[4] It is apparent that such a procedure at the state level, where the first avenues of appellate relief should be clear and unrestricted, is manifestly unjust. The method presently in operation in West Virginia denies an aggrieved appellant the proper review and consideration contemplated by the dictates of fundamental fairness, due process and equal protection.

Although no statutory provision expressly states that there is no right to an appeal in West Virginia, the West Virginia Supreme Court of appeals has consistently held that the provisions of Chapter 58, Article 5, *et seq.*, do not provide an appeal as a matter of right even in criminal cases.[5] In *State* v. *Legg*, 151 W. Va.

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[4]Unlike West Virginia, however, there is a review as a matter of right to the Circuit Courts of Appeals in the federal system which provides an effective review. With variations, this is the appellate procedure adopted in all but two of the States.

[5]West Virginia Code, 58-5-10, 1931, as amended, provides: "The court or judge to whom a petition is duly presented, if of the opinion that the decision complained of ought to be reviewed, may allow an appeal . . ." Certainly implicit in this provision is the discretionary nature of the granting of an appeal; however, no provision in the Code expressly denies the right to appeal. The statutory procedure and cases interpreting that procedure speak for themselves.

401, 151 S. E. 2d 215 (1966), a criminal appeal, the West Virginia Supreme Court of appeals held:

> "One convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error . . . There is no absolute right in a suitor to have a decision against him reviewed . . ."

It is apparent from the foregoing that an appellant in West Virginia is not afforded the same rights and privileges as appellants in other states.[6] The petitioners herein were effectively denied a full appellate review without reason or explanation. There were valid assertions of constitutional as well as other errors at the trial court level raised by petitioners in their application for appeal below and such claims of error should not be cast aside summarily without full review and hearing.[7]

Petitioners have been denied their constitutionally protected right to property without due process of the law and have been denied equal protection of the laws. Petitioners are penalized for residing in one of the only two jurisdictions in the country which do not make the

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[6]However, similar statutes have provoked similar case holdings in the State of Virginia. See *Hulvey* v. *Roberts*, 106 Va. 189, 55 S. E. 585 (1906); *Avery* v. *County School Board*, 192 Va. 329, 64 S. E. 2d 767 (1951).

[7]Although Rules of Practice in the Supreme Court of Appeals of West Virginia allow a maximum 10 minutes oral presentation of the application for appeal, for all practical purposes there is not sufficient time to argue the various legal issues raised upon the application and the merits of the case are rarely gone into at depth. The only meaningful treatment of legal questions is in appellant's brief.

appellate review procedure available as a right. The Ninth and Fourteenth Amendments to the United States Constitution can clearly be viewed as protecting the right to appeal for all citizens of the United States.

Appellate review and the right to be heard upon appeal without unreasoned restrictions have been the subject of many cases in this Court. *Rinaldi* v. *Yeager*, 384 U. S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966), was a criminal appeal involving a prisoner's right to a transcript upon appeal. Rinaldi was proceeding in *forma pauperis* and could not afford the transcript required by New Jersey statutes. In reversing, this Court, per Justice Stewart, held:

> "This Court has never held that the States are required to establish avenues of appellate review, but *it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts . . .*" (Emphasis Supplied).[8]

Another case dealing with the furnishing of a transcript is *Mayer* v. *City of Chicago*, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971), wherein, at page 193 of the United States Report, this Court readopted the rule in *Rinaldi* saying:

> ". . . avenues of appellate review must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . .

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[8]There have been many "right to transcript" cases ruled upon both in this Court and in the various federal and state appellate courts. These cases are cited primarily to amplify the logic which underlies all decisions which afford appellate tools to indigents and others, i.e., the sanctity of the appeal itself.

> Therefore, in all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds . . ."

In West Virginia not only indigents but *every* aggrieved party seeking an appeal are shackled by the same unreasoned distinctions and restrictions.

The case of *Williams* v. *Oklahoma City*, 395 U. S. 458, 89 S. Ct. 1818, 23 L. Ed. 2d 440 (1969), similarly upheld the appellant's right to a transcript. The view as set forth in *Rinaldi* v. *Yeager*, 384 U. S. 305, *supra*, was followed and this Court also noted:

> "Although the Oklahoma statutes expressly provide that 'an appeal to the Court of Criminal Appeals may be taken by the defendant as a matter of right . . .' the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner . . . This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make . . ."

The instant case would perhaps be different if West Virginia was only one of many states which deny a civil or criminal appeal as a matter of right. However, the language used by this Court in the foregoing cases indicates the gravity and importance of an unrestricted appellate process. Indeed, the Constitution intended to protect civil property rights as well as life and liberty. As noted in the Judicature article above[9] the Model Judicial Article proposed by the American Bar Association recommends that a defendant shall have an absolute right to one appeal in all criminal

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[9]See foot note 2, *ante*.

cases.[10] Without a doubt due process and equal protection guarantees protect civil litigants as well as criminal. See *Boddie* v. *Connecticut*, 401 U. S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 45 (1971).

Petitioners are thus asserting a right afforded the vast majority of citizens in this country. Whether a new and more approachable appellate system in West Virginia should result from this case is for this Court to decide upon the basis of its determination of the federally protected constitutional rights claimed herein. The system in West Virginia as it now stands violates fundamental fairness and equal protection in that the majority of appellants in this state possess rights without remedies.[11] Petitioners have no remedy at this time save the relief sought in this Court; had petitioners resided in any other state their appeal would have been properly heard long ago.

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[10]See 87 A.B.A. Rep. 391-399 (1962).

[11]The Fourth Circuit Court of Appeals recently had occasion to review and compare the West Virginia recidivist statute with other states and grant habeas corpus relief in *Hart* v. *Coiner*, 483f.2d 136 (4th Cir. 1973), petition for writ of certiorari docketed on November 6, 1973, as No. 73-739. The Court there took into account a comparison of the punishment Hart could receive in West Virginia as compared with other states, in effect applying an "equal protection" standard.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of September, 1973, the following order was made and entered, to-wit:

OTHO W. KNOPP, *et al.*
v.
K. G. PARSONS, *et al., etc.*

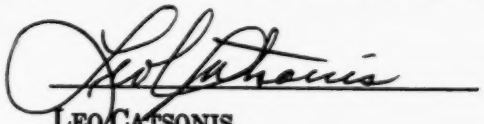
On a former day, to-wit, February 5, 1973, came the petitioners, K. G. Parsons and Iva E. Parsons, by Leo Catsonis, their attorney, and presented to the Court their petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Jackson County rendered in this action on the 16th day of June, 1972, overruling defendants motion to set aside the judgment entered on the 1st day of May, 1972, with the record therein accompanying the petition and note of argument in support thereof, which being seen and inspected by the Court the appeal and supersedeas prayed for is refused.

A True Copy

Attest: _____
Clerk Supreme Court of Appeals

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of the attorneys for the petitioners, and a member of the bar of The Supreme Court of The United States, hereby certify that, on the 14th day of December, 1973, I served three copies of the foregoing Petition for a Writ of Certiorari on The Respondents by depositing same in a United States mail box, with postage prepaid, addressed to counsel of record for the Respondents, Orton A. Jones, Esquire, 216 Market Street, Spencer, West Virginia 25276. I further certify that all parties required to be served have been served.



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207 Security Building
Charleston, West Virginia 25301

Of Counsel for Petitioners

FILED
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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-933

K. G. PARSONS, IVA E. PARSONS, *et al*
Petitioners,

v.

OTHO KNOPP AND NAOMI M. KNOPP,
Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ORTON A. JONES
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

K. G. PARSONS, IVA E. PARSONS, *et al*,
Petitioners,

v.

OTHO KNOPP AND NAOMI M. KNOPP,
Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Respondents respectfully oppose the petition of petitioners that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on September 17, 1973.

OPINION BELOW AND OTHER MATTERS

For purposes of this proceeding respondents accept the version of the opinion below, timeliness of filing of the petition, questions presented, constitutional and statutory provisions cited and the statement of the case all as set forth in the petition.

REASONS FOR DENYING THE WRIT

1.

No Federal Constitutional Question Is Here Presented On The Issue Of Any Right Of Petitioners To A Jury Trial.

Petitioners have admitted in their petition that the principal object and concern of this lawsuit was the reformation of a deed on the basis of a mutual mistake of fact, clearly relief that was equitable in nature. Certainly all other relief in the case flowed obviously and necessarily from that issue. A court of equity ought to do justice completely and not by halves. 27 Am. Jur. 2d, *Equity* § 119 (1966). Although the West Virginia Rules of Civil Procedure abolished procedural distinctions between actions at law and suits in equity in that State they created no new right of trial by jury where none had theretofore existed. Rule 38, W. Va. RCP.

It has long been held in West Virginia that where a court of equity has properly acquired jurisdiction on equitable grounds, it will go on to do complete justice, though in so doing it has to administer remedies which rightly pertain to a court of law. *Koen v. Koen*, 86 W. Va. 503, 103 S.E. 322 (1920).

In any event, this is a question of construction of the rules of procedure and equity jurisprudence of the State, which has been passed upon by the appellate court of that State and does not present a federal constitutional question cognizable by this Court.

Moreover, the petition for appeal and supersedeas filed by petitioners in the Supreme Court of Appeals of West Virginia was a petition for appeal from a certain Order of the Circuit Court of Jackson County, West Virginia, on June 16, 1972, by which Order the said Circuit Court denied the motion of petitioners to set aside the judgment and award a new trial. (Petition for Appeal and Supersedeas, pages 1 and 2).

The said motion of petitioners, the denial of which was the alleged

grievance from which appeal was sought, was filed May 10, 1972, and, although containing six assignments of error as grounds therefor, did not assign or otherwise mention a denial of a trial by jury as error constituting grounds for said motion.

The case of *Steptoe v. Mason*, 153 W. Va. 783, 172 S. E. 2d 587 (1970), in construing Rules 7 (b) and 59 (b), W. Va. Rules of Civil Procedure, held that Rule 7 (b) requires that grounds for a motion for a new trial be stated with particularity.

Thus in omitting the question of a jury trial from their motion, petitioners should not be held to complain, for that specific reason, of an order denying their motion. This is a matter within the peculiar purview of the State appellate court and is not a federal constitutional question that should be reviewed by this Court.

Further, petitioners, in their assertion of a right to trial by jury of the issues in this case base that assertion upon their construction of language of particular State statutes contained in the West Virginia Code. Thus their position is necessarily based upon a right granted, if at all, by legislative enactment, under these specific facts and circumstances, not upon any basic constitutional principles.

It is the province of the State appellate court to review and construe the statutes enacted by the Legislature of that State, as well as the accumulated body of law relating to suits in equity, actions at law, statutory proceedings and rules of procedure, a principle which applies to the case at bar. The facts and applicable law, as the same are held to be by petitioners, were fully and amply presented to the Supreme Court of Appeals of West Virginia by petitioners, much more extensively than in their petition before this Court. After full and complete review and consideration thereof, with no opposing brief or memorandum submitted, the Supreme Court of Appeals refused the appeal and supersedeas. The judgment of the Circuit Court, as thus affirmed by the State Supreme Court of Appeals, should not be disturbed.

The case of *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed 2d 729 (1970), cited by petitioners, is inapplicable here, being a stockholders' derivative suit in which federal laws and procedures were applied in a United States District Court, later appealed to a United States Court of Appeals and thence to this Court. That case had no connection with any state law or state tribunal.

2.

The Decision Below Denied Petitioners No Appeal Protected By The United States Constitution.

This court stated in *Rinaldi v. Yeager*, 384 U. S. 305, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966) and reaffirmed in *Williams v. Oklahoma City*, 395 U.S. 458, 23 L. Ed. 2d 440, 89 S. Ct. 1818 (1969), that "This Court has never held that the States are required to establish avenues of appellate review..." and then continued to state "but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The petitioner in the *Rinaldi* case was indigent and was effectively barred from any appeal by reason of his pecuniary inability to pay for the required transcript of proceedings. The line of cases on this point has treated as an unreasoned distinction the inability to finance the various requirements of an appeal.

An unreasoned distinction, therefore, is one which grants an appeal to one litigant but denies it to another based upon requirements in the law to which both are subject that are wholly alien to the merits of the respective controversies, such as ability to pay for the transcript of record.

It is interesting to note petitioners' observation that in West Virginia not only indigents but every aggrieved party seeking an appeal is shackled by the same unreasoned distinctions. Certainly if all are

treated alike there is no distinction.

Surprisingly, petitioners even admit that the instant case would perhaps be different if West Virginia were only one of many states which deny an appeal as a matter of right.

Is this to say that changes made by the Legislatures or by the constitution - altering processes of "many" sister states would alter the rights of West Virginians without the people of West Virginia taking any active step to establish or change their own rights?

By petitioners' own admission, the people of West Virginia in their constitution, and their Legislature in the statutes, have established an avenue of appellate review and it is being administered even-handedly among all of her citizens.

Petitioners also admit that under West Virginia appellate procedure every party deeming himself aggrieved by a final order of a circuit court may petition *ex parte* for a writ of error. His petition is accompanied by a note of argument in support of his petition. His case is set down for oral argument before the entire Supreme Court of Appeals. This opportunity is given to all petitioners as of right and was in fact enjoyed by the petitioners in the instant case.

What is not extended as a matter of course is the filing of an opposition brief and presentation of oral argument by parties opposing the appeal. In essence, the points and arguments advanced by petitioners are the only points and arguments read or heard by the court, a tremendous advantage of which these petitioners can hardly complain.

Where, as in the instant case, the entire appellate court reads one party's petition and brief and hears his oral argument and receives nothing from his opponent and yet determines to deny his appeal, whatever could be gain from forcing the court to hear the other side of the case?

Petitioners have wholly failed to demonstrate that they have been prejudiced in any particular as to any right protected by the Constitution of the United States and cognizable by this Court.

CONCLUSION

For the foregoing reasons respondents respectfully submit that the decision of the Supreme Court of Appeals of West Virginia should be affirmed and the writ of certiorari should be denied.

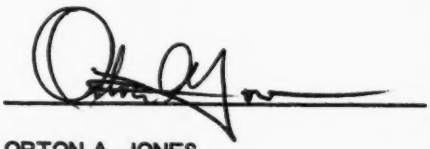
Respectfully submitted,

ORTON A. JONES
HEDGES AND JONES
216 Market Street
Spencer, West Virginia 25276

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Orton A. Jones, attorney for the respondents, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 30th day of April, 1974, I served three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari on the petitioners by depositing same in a United States post office, with postage prepaid, addressed to counsel of record for the petitioners, Leo Catsonis, Esquire, 207 Security Building, Charleston, West Virginia 25301. I further certify that all parties required so to be served have been so served.



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FILE COPY

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IN THE

Supreme Court Of The United States

October Term, 1973

NO. 73-933

K. G. PARSONS, IVA E. PARSONS, *et al.*,
Petitioners,

v.

OTHO W. KNOPP AND NAOMI M. KNOPP,
Respondents,

PETITION FOR REHEARING UPON THE WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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IN THE

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OTHO W. KNOPP AND NAOMI M. KNOPP,
Respondents,

PETITION FOR REHEARING UPON THE WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GROUNDS FOR REHEARING

Petitioners respectfully represent unto this Honorable Court that the intervening case of *Pernell* v. *Southall Realty*, 94 S. Ct. 1723, decided on April 24, 1974, subsequent to the filing of the original petition for writ of certiorari in December, 1973, and therefor not previously presented, contains similar issues of substantial and controlling effect relative to the petition herein. Therefore, petitioners respectfully request a rehearing pursuant to Rule 58, Supreme Court Rules.

STATEMENT OF THE CASE

On December 17, 1973, the petitioners filed a petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia pursuant to jurisdiction granted by 28 U. S. C. §1257 (3). The questions presented in that petition were:

> "1. Whether petitioners were denied their Seventh Amendment right to trial by jury in all civil cases.
>
> "2. Whether West Virginia appellate procedure denied petitioners due process and equal protection of the laws, as guaranteed by the Ninth and Fourteenth Amendments, in that petitioners were effectively denied an appeal as a matter of right." (Original Petition, p. 2).

Petitioners' basic contention was that the proceeding in the trial court was in the nature of ejectment or ouster of persons from land and therefore afforded petitioners a Seventh Amendment right to trial by jury.

On May 28, 1974, this Court denied the petition for writ of certiorari and the petitioners now request a rehearing pursuant to Rule 58, Supreme Court Rules.

ARGUMENT

The original petition for writ of certiorari herein was filed prior to the reporting of the two intervening United States Supreme Court decisions dealing directly with the issue of Seventh Amendment right to trial by jury as raised in the original petition. The two

cases are: *Pernell* v. *Southall Realty*, 94 S. Ct. 1723 (1974) and *Curtis* v. *Loether*, 94 S. Ct. 1005 (1974).

The suit in *Pernell* v. *Southall Realty, supra*, was in the nature of ejectment or eviction as is the case at bar. Pernell was a tenant of Southall Realty and upon a rent default, Southall Realty instituted a statutory proceeding for ejectment and recovery of the real property occupied by Pernell. Pernell answered by asserting breach of contract and unsafe premises of the part of the plaintiff. A trial by jury was demanded by the defendant Pernell in his answer. The trial judge struck the jury trial request, however, and tried the case himself, subsequently entering judgment for Southall Realty. The Court of Appeals, in affirming the District Court's decision, held that jury trials are not afforded in such cases involving repossession of the premises in question.

This Court, in noting that the District of Columbia statute preserving the right to trial by jury had been repealed, granted certiorari to Pernell on the Seventh Amendment question. At page 1727, after discussing its jurisdiction to review the District of Columbia case, the Court began its treatment of the Constitutional issues:

> "The Seventh Amendment provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .'
>
> "*This Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury.* In *Whitehead* v. *Shattuck*, 138 U. S. 146, 151, 11

S. Ct. 277, 34 L. Ed. 873 (1891), for example, we recognized 'it would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law . . .; but this may be said, that *where an action is simply for the recovery and possession of specific, real, or personal property, or for the recovery of a money judgment, the action is one at law.*'" (Emphasis supplied).

As in the instant case, the respondent in *Pernell* argued that there is a distinction to be made between actions involving title issues and actions to repossess. However, in reviewing the common law history and nature of the causes of action questioned herein, Justice Marshall made the following comments:

"The distinction between title to and possession of property, of course, was well recognized at common law. . . . But, however, it was for certain purposes, it had no bearing on the right to a jury trial. *The various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded.*

"Writs of entry . . . were developed to encompass situations not covered by the assize of novel disseisin. Novel disseisin, for example was applicable only where the defendant gained possession wrongfully by putting the plaintiff out of seisin. Writs of entry, in contract, permitted recovery where the defendant entered into possession lawfully but no longer had rightful possession . . . the writ of entry *ad terminum qui praeterit* . . . embodied a cause of action quite similar to that encompassed in §16-1501 (D. C. Code real estate

repossession provision). *Significantly for present purposes, it is clear that either party could demand a jury trial.*

"Ejectment originated as a very narrow remedy . . . but *eventually developed into the primary means of trying either the title to or the right to possession of real property. . . . And . . . questions of fact arising in an ejectment action were resolved by a jury.*" (Emphasis supplied).

The nature of the relief sought in the trial court has been strictly categorized as a deed reformation action by the respondents. However, the nature of relief actually sought in the complaint is basically one which seeks to oust the petitioners from specific land and to clear the title thereto. As noted in the original petition herein, at page 6, a West Virginia Code provision, Chapter 55, Article 4, 1931, as amended, applies to actions of ejectments, ouster, and similar remedies. West Virginia Code, 55-4, *et seq.* and the D. C. Code provision in *Pernell* v. *Southall Realty, supra*, are not dissimilar. The respondents in *Pernell*, as in the instant case, argued that these statutory remedies are not the equivalent of ejectment as known at common law. This Court rejected that argument, at page 1729 of the *Pernell* opinion, by saying:

"In our view, this analysis is fundamentally at odds with the test we have formulated for resolving Seventh Amendment questions. We recently had occasion to note that *while 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time.' Curtis* v. *Loether*, ... U. S. ....., 94 S. Ct. 1005, 1007, 39 L.

Ed. 2d 260 (1974). The phrase 'suits at common law' includes not only suits 'which the common law recognized . . . but suits in which legal rights were to be ascertained and determined. . . .'

"Whether or not a close equivalent to §16-1501 (D. C. C. E.) existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty. . . ." citing *Curtis* v. *Loether*, *supra*. (Emphasis supplied).

CONCLUSION

Both the *Pernell* case and *Curtis* v. *Loether* make reference to *Ross* v. *Bernhard*, 396 U. S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). The petitioners herein cited extensively from the *Ross* opinion on pages 8 through 11 of the original petition. Respondents have failed to adequately meet the holding of *Ross* and in light of the two recent cases discussed herein, it is obvious that further determination of the constitutional issue of trial by jury be allowed.

CERTIFICATE OF GOOD FAITH

I, LEO CATSONIS, one of the attorneys for the petitioners, and a member of the bar of the Supreme Court of the United States, hereby certify that the petition for a rehearing herein is pursued in good faith and not for any purposes of delay whatsoever. Further, I certify that the petition for rehearing is restricted to the grounds as set forth by counsel herein.

LEO CATSONIS
CATSONIS & LINKOUS
207 Security Building
Charleston, West Virginia 25301

Of Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of the attorneys for the petitioners, and a member of the bar of The Supreme Court of The United States, hereby certify that, on the 21st day of June, 1974, I served three copies of the foregoing Petition for a Writ of Certiorari on The Respondents by depositing same in a United States mail box, with postage prepaid, addressed to counsel of record for the Respondents, Orton A. Jones, Esquire, 216 Market Street, Spencer, West Virginia 25276. I further certify that all parties required to be served have been served.

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